FIRST DIVISION
NOVEMBER 24, 2014

No. 1-12-2869

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 12337
	)	
JEFFREY JEWITT,	)	Honorable
	)	Thomas M. Tucker,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The admission of other-crimes evidence was not an abuse of discretion, because the State was entitled to present admissible evidence establishing every element of the offense regardless of the defense presented; admission of out-of-court statements did not constitute hearsay or violate defendant's right of confrontation where the statements were admitted to show the course of the police investigation, and defense counsel was not ineffective for failing to raise a futile hearsay or right of confrontation objection; mittimus must be corrected to accurately reflect the trial court's oral pronouncement merging Counts 1 and 3. Affirmed; mittimus corrected.

¶ 2 Following a bench trial, defendant Jeffrey Jewitt was found guilty of two counts of child abduction and sentenced to four years and six months' imprisonment. On appeal, defendant contends that (1) the trial court improperly admitted other crimes evidence; (2) the trial court

improperly admitted evidence of out-of-court identifications of defendant in violation of the hearsay rule and confrontation clause; (3) trial counsel was ineffective for failing to object based on hearsay and confrontation clause bases; and (4) his mittimus must be corrected to reflect a single conviction for child abduction. We affirm and correct the mittimus.

¶ 3 Defendant was charged with four counts of child abduction arising from two incidents on July 5 and July 7, 2011, during which he was alleged to have attempted to lure a child into his car. The same victim, a 12-year-old boy A.B., was involved in each incident.

¶ 4 Prior to trial, the State moved to introduce evidence of other crimes. The State sought to introduce evidence of two other incidents, involving two additional victims, C.L. and A.K.

¶ 5 The State alleged that on October 14, 2008, defendant approached an 11-year-old girl, C.L., in a red four-door car and said "come here I want to show you something." When C.L. approached the car she saw defendant masturbating. C.L. ran down an alley and the defendant followed her in his car, until she entered a garage and asked for help.

¶ 6 The State also alleged that on November 17, 2008, defendant approached a 12-year-old girl, A.K. in a red four-door car. When A.K. walked past the car, defendant asked "do you want to come with me." A.K. saw defendant shaking, said no, and ran home.

¶ 7 The State argued that the other-crimes evidence was relevant to show *modus operandi* and intent. Defendant argued that the only similarities, the attempt to lure a child into a car were elements of the offense of child abduction and would be present any time someone committed the offense. Defendant further argued that the differences, gender of the victims, type of car used, and the three-year gap between the alleged offenses defeated a finding that the evidence was relevant. The trial court held that the evidence was admissible.

¶ 8 At trial, A.B. testified that he was born on November 4, 1998. In July 2011, he was 12 years old. On July 5, 2011, at approximately 3:30 p.m., he rode his bicycle to a country club for a tennis lesson. As he was riding, a car pulled up near him. The driver, whom A.B. identified as defendant, said "Hey, come here." Defendant then said he was A.B.'s mother's cousin and asked if A.B. wanted a ride. A.B. thought this was odd, because his mother was originally from Panama and did not have relatives in the Chicago area. A.B. rode off, went to his tennis lesson, and later reported the encounter to his parents.

¶ 9 A.B. further testified that his father took him to a police station, where he described the driver and his car.

¶ 10 A.B. testified that on July 7, 2011, at approximately 5:15 p.m., he was sitting outside the country club waiting for his mother to pick him up. He saw the same car pull up and recognized defendant as the driver. Defendant asked if A.B. remembered him. A.B. ran into the country club and contacted his mother.

¶ 11 A.B. further testified that he returned to the police station where he participated in the preparation of a sketch of the offender and looked at photos of cars. A detective later met A.B. at his home and showed him an array of photographs. A.B. selected defendant's photograph from the array. The detective also showed A.B. a photograph of an automobile, which A.B. identified as the same model defendant was driving. A.B. had previously identified a photograph of a car that he thought was similar to defendant's car. A.B. subsequently identified defendant in a line-up.

¶ 12 On cross-examination, A.B. acknowledged that he initially described the offender as 40 to 45 years old and five feet seven inches tall, with a thin build. He further acknowledged that he described defendant's car as a four door and did not mention a convertible top.

¶ 13 A.B.'s father, Joseph B. testified that he never gave defendant permission to pick up A.B. A.B.'s mother, Iliana B. testified that, in July 2011, she did not have any cousins living in the Chicago area, and that she never gave defendant permission to pick up A.B.

¶ 14 Elmwood Park police officer Mark Astrella testified that he investigated the incident involving A.B. As part of that investigation he asked another officer to work with A.B. to prepare a composite sketch of the offender. Astrella placed that composite sketch in a "critical reach bulletin," and distributed the bulletin to other police agencies. Astrella received "numerous" telephone calls with information related to the bulletin. Defendant objected, arguing hearsay, when Astrella was asked if he received a name from the other agencies. The State argued that the question merely requested information regarding the course of the investigation, and how defendant came to be a suspect. The trial court overruled the objection.

¶ 15 Astrella further testified that after receiving defendant's name, he prepared a six-person photo array and showed it to A.B. A.B. identified defendant from the array. Astrella also obtained a critical reach bulletin from the Park Ridge police department, which depicted a suspect's vehicle. A.B. identified the vehicle as the offender's. Astrella went to defendant's home, spoke with his parents and waited for defendant to return. When he did so, defendant was driving a silver Chrysler that matched the car A.B. had identified from the Park Ridge bulletin. Astrella arrested defendant, and subsequently conducted a line-up. A.B. identified defendant in the line-up.

¶ 16 On cross-examination, Astrella testified that when he was booked, defendant was 29 years old, weighed 225 pounds and was six feet, three inches, tall. Astrella further testified that the car A.B. originally described was a silver Contour, a four-door automobile. Astrella admitted that defendant's car was a two-door convertible, and that the black top was "very noticeable."

¶ 17 Park Ridge police officer Steve Stopka testified that, on July 7, 2011, he was investigating an incident that involved an individual driving near schools and parks. Defendant objected, arguing that the incident was unrelated. The State responded that it was simply attempting to establish a timeline. The trial court overruled the objection. The State then inquired about a conversation Stopka had with defendant, and defendant objected. Following argument by the parties, the trial court ruled the conversation was inadmissible and the State asked no further questions of Stopka.

¶ 18 Elmwood Police commander Michael Kmiecik testified that he spoke with A.B. as part of the investigation and received a description of a four-door silver automobile. Kmiecik searched the internet and found a picture of a car that A.B. said was similar to the offender's.

¶ 19 On cross-examination, Kmiecik admitted that A.B. never told him the offender's car was a convertible, and did tell him that it was a four door.

¶ 20 Tito Ilarraza testified that he was defendant's probation officer. On July 7, 2011, at 3:55, he met with defendant for 10 to 15 minutes. Ilarraza further testified that his notes indicated that the home confinement unit met with defendant on July 5, 2011, at 11:31 p.m.

¶ 21 C.L. testified that on October 14, 2008, she was 11 years old. She left school that day at 3:30 p.m. As she was walking home, a red car stopped and blocked her path. Defendant was driving the car and said, "Come over here. Look at this." C.L. noticed that defendant was not wearing pants and was "playing with himself." C.L. began walking away toward the rear of the car. Defendant backed the car up and followed her. C.L. ran until she saw an open garage, and asked the people inside for help. C.L. later identified defendant in a photographic array.

¶ 22 The State did not, ultimately, present any evidence regarding the incident involving A.K.

¶ 23 The State introduced a certified copy of defendant's prior conviction for child abduction. The State rested, and defendant moved for a directed finding. The trial court denied the motion.

¶ 24 The parties stipulated that, if called to testify, Greg Cappeli would testify that he saw a Ford Contour that matched the description of the car listed on a flyer regarding an attempted child abduction, driving in the parking lot of the country club. The car circled the parking lot twice and then left.

¶ 25 Jacqueline Jewitt, defendant's mother, testified that she was working on July 5, 2011, and went home for her lunch break at approximately 1:45 p.m. When she arrived home, defendant was in the shower. She stayed home until approximately 2:30, and when she left defendant was still there. She worked until approximately 5:30 p.m., stopped to care for her grandson two blocks from her home, and stayed there until 7 p.m.

¶ 26 Jacqueline further testified that on July 7, 2011, she arrived home at 5:30 p.m. Defendant was not home, but his car was parked on the street. Defendant arrived home at approximately 5:45 p.m. riding his motorcycle.

¶ 27 On cross-examination, Jacqueline admitted that she had no idea where defendant was at 3:30 p.m. on July 5, 2011.

¶ 28 Jerry Jewitt, defendant's father testified that on July 5, 2011, defendant left the house at 9 a.m. and arrived home again at 2 p.m. Jerry stayed at home until 3:50 p.m. When he left defendant was asleep in the back room.

¶ 29 Jerry further testified that on July 7, 2011, he worked from 8 a.m. until 2:30 p.m. When he arrived home, defendant was home. Defendant left on his motorcycle at 3 p.m. to go see his probation officer. Defendant arrived home again at approximately 5:30 p.m.

¶ 30 On cross-examination, Jerry admitted that he never told the police or the State's investigator that defendant could not have committed the offenses with which he was charged.

¶ 31 Defendant elected not to testify, and the parties presented closing argument. Following argument, the trial court found that defendant was the person who stopped A.B. on both July 5, and July 7, 2011. However, the trial court found that there was insufficient evidence of child abduction for the July 7, 2011 incident, and acquitted defendant of those counts. The trial court found defendant guilty of child abduction for the July 5, 2011 incident and merged the two counts based on that offense. The trial court subsequently sentenced defendant to four years and six months' imprisonment. Defendant appeals.

¶ 32 On appeal, defendant first contends that the trial court erred when it admitted evidence of other crimes. Defendant argues that the other crimes evidence lacked sufficient "distinctive features" to justify admission to establish *modus operandi*. Defendant further argues that "intent was not an issue" because he denied being the perpetrator and presented an alibi defense. The State responds that because it had the burden of proving intent, defendant's other crimes were relevant, and that there were sufficient similarities to allow use of other crimes evidence to establish *modus operandi*.

¶ 33 Generally, evidence of other crimes is inadmissible if used to show a defendant's propensity to commit crime. *People v. Viramontes*, 2014 IL App (1st) 130075, ¶ 56. However, other crimes evidence is admissible to show, among other things, intent (*Id.*), absence of mistake (*People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 55), absence of innocent mental state (*Jaynes*, 2014 IL App (5th) 120048, ¶55), or *modus operandi* (*People v. Colin*, 344 Ill. App. 3d 119, 126-27 (2003)). In order for evidence of other crimes to be admissible to show *modus operandi*, there must be some clear connection which creates a logical inference that if defendant committed the

former crimes, he may have committed the crime charged. *Colin*, 344 Ill. App. 3d at 127. When offered to prove intent or the absence of an innocent mental state, however, a general similarity will suffice. *Jaynes*, 2014 IL App (5th) 120048, ¶ 56. The admission of other-crimes evidence is a matter within the discretion of the trial court, and we will reverse only where the decision is arbitrary, fanciful or unreasonable. *Id.* ¶ 55.

¶ 34 Here, defendant devotes much of his argument to the question of whether there was sufficient similarity to prove *modus operandi*. Defendant essentially dismisses the State's argument regarding absence of an innocent state of mind, by arguing that "the only contested issue [was] the identity of the perpetrator." We disagree with defendant. "It is well settled that 'the prosecution is not disabled at trial from proving every element of the charged offense and every relevant fact, even though the defendant fails to contest an issue or is willing to stipulate to a fact.' " *People v. Willis*, 299 Ill. App. 3d 1008, 1020 (1998), quoting *People v Bounds*, 171 Ill. 2d 1, 46 (1995). Here, we find the State was properly permitted to marshal all of the evidence at its disposal to prove each element of the offense. Defendant's argument that identity was the only issue in contention at trial rings hollow in the face of his acquittal on the counts arising from the July 7, 2011, incident. Clearly, if identity were the only issue, the trial court would have found defendant guilty of all counts after finding that he was the perpetrator in both incidents. Moreover, we are reluctant to adopt a rule of law that would allow defendants control over which elements of a charged offense, the State would be permitted to present evidence to prove its case. Doing so would put prosecutors in the unenviable position of having to present sufficient evidence of each element of an offense without presenting *too much* evidence of a defendant's guilt--a balancing act that would be difficult for the trial courts to oversee. It would also give defendant an unintended possibility of manipulating how the State presented its case.

¶ 35 We do not mean to suggest, however, that the State's presentation of evidence can proceed without limits. The rules of evidence still apply, and other crimes evidence is still subject to the general rule that evidence must be relevant. See *People v. Kraybill*, 2014 IL App (1st) 120232, ¶ 42. "Evidence is deemed relevant 'if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence.' " *Id.*, quoting *People v. Morgan*¸197 Ill. 2d 404, 455-56 (2001). Evidence of other crimes, however, is generally not admissible to show propensity, *i.e.*, that defendant is the type of person who would have committed the crime. *People v. Stanbridge*, 348 Ill. App. 3d 351, 354 (2004). Propensity evidence is generally inadmissible, not because it lacks relevance, but because it may be too relevant, or, in other words, because there is a danger that the evidence may overpersuade the jury into convicting a defendant not because he committed the crime, but because he is a bad person deserving punishment. *Id.* citing *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). For this reason, the trial court must be careful to weigh the probative value of the evidence against the potential for prejudice. *Stanbridge*, 348 Ill. App 3d at 355.

¶ 36 Defendant is correct that the choice of a defense can affect the relevance of other-crimes evidence and, accordingly, the question of whether the prejudicial effect substantially outweighs the probative value. See *Id.* However, we find that defendant reads *Stanbridge* much too broadly to the extent that he argues that other-crimes evidence has no relevance to intent when a defendant denies being the perpetrator. Rather, we find that this is a subtle question that depends on the facts and circumstances of the case, the evidence presented, and the defenses raised. For this reason it is a matter properly committed to the discretion of the trial court. See *People v Adkins*, 239 Ill. 2d 1, 23 (2010), citing *People v. Illgen*, 145 Ill. 2d 353, 365 (1991). Here,

although defendant argued that this was a case of mistaken identity and presented alibi testimony from his parents, the issue of intent was, as evidenced by the trial court's findings, very much in contention. Therefore, we reject defendant's reliance on *Stanbridge* and similar cases and find that the admission of other-crimes evidence did not constitute an abuse of discretion in this case.

¶ 37 Defendant next contends that the trial court improperly admitted testimonial hearsay that defendant was the man depicted in the composite sketch and was the suspect in an unrelated offense. Defendant acknowledges that trial counsel failed to properly preserve the errors but urges us to consider them under the plain-error doctrine arguing that the evidence against him was closely balanced. The State responds that the evidence was neither testimonial nor hearsay because it was introduced solely for the purpose of explaining the course of the police investigation.

¶ 38 Generally, to preserve an issue for review, a defendant must both object at trial an in a written posttrial motion. *People v. Wright*, 2013 IL App (1st) 103232, ¶ 59, citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain-error exception " 'allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Id.*, quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Before we reach the issue of whether the error was plain, however, we must first ask whether there was any error. *Id.*, ¶ 60.

¶ 39 The hearsay rule generally prohibits the introduction of an out-of-court statement for the purpose of establishing the truth of the matter asserted. *Id.*, ¶ 73. However, a police officer's

testimony that he received information during the course of his investigation falls outside the hearsay prohibition when such evidence is limited to explaining why the police arrested defendant or took other action. See *In re Jovan A.*¸2014 IL App (1st) 103835, ¶ 23. This type of testimony is not hearsay because it is offered to show the steps a police officer took in his investigation rather than for the truth of the matter asserted. *Id*., citing *People v. Rush*, 401 Ill. App. 3d 1, 15 (2010). We review the trial court's evidentiary rulings for an abuse of discretion. See *People v. Trzeciak*, 2014 IL App (1st) 100259-B, ¶ 65, citing *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 40 Here we cannot find that the trial court abused its discretion in admitting the police officers' testimony because it was admitted solely to recount and explain the course of their investigations. Defendant cites two instances of allegedly improperly admitted evidence: Astrella's testimony that he received numerous phone calls naming defendant after he circulated the composite sketch; and Stopka's testimony that he was investigating reports of a man driving near schools and parks when he went to interview defendant. We find neither instance involved testimony offered for the truth of the matter asserted. Astrella's testimony, for example, implied that defendant was known by local police officers and was likely a suspect in other crimes. However, it was not admitted to prove that defendant was known to other police officers or that he had committed other crimes. Rather, it was admitted solely to explain a simple step in Astrella's investigation. That is, it was admitted to explain why, after having a composite sketch prepared, Astrella decided to include defendant in a photo array and later a live line-up. Although the testimony might have implied that Astrella had conversations with other unnamed police officers and might have implied that defendant was a suspect in other unnamed crimes, it was not offered to prove the truth of those implications and, therefore, was not hearsay.

Similarly, Stopka's testimony was offered merely to explain why he was attempting to interview defendant. In both instances, although the testimony implied defendant was involved in other unrelated offenses, it was not offered to prove that other offenses actually occurred. Therefore, the testimony was not hearsay and the trial court did not abuse its discretion when it admitted the evidence in question for the specific purpose described.

¶ 41 Defendant relies on a Seventh Circuit case, applying federal law to an Indiana conviction, to argue that the trial court should have only admitted evidence that Astrella and Stopka "acted 'upon information received' or words to that effect." See *Jones v. Basinger*, 635 F.3d 1030, 1047 (7th Cir. 2011), quoting 2 McCormick on Evidence § 249 (7th ed.). However, defendant reads more into *Jones* than that case holds. *Jones* merely recognizes that there exists a continuum of out of court statements under the "course of the investigation" exception, from the clearly improper, during which the officers " 'narrate the course of their investigation,' " to the clearly proper "acted 'upon information received.' " *Id.*, quoting *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) and 2 McCormick on Evidence § 249 (7th ed.). While recognizing the continuum, *Jones* did not draw a bright-line rule that only the most limited discussion would be permitted. Here, we find that the statements actually admitted fall far closer to the permissible end of the spectrum than they do to the impermissible narrative end. Accordingly, we cannot find that the trial court abused its discretion when it admitted these limited statements that revealed the existence of out-of-court statements.

¶ 42 Having determined that the allegedly improper testimony was not offered for the truth of the matter asserted, *i.e.*, that it was admissible nonhearsay, we must further conclude that the admission of the evidence does not implicate the confrontation clause. See *People v. Nugen*, 399

Ill. App. 3d 575, 586-87 (2010), citing *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) and *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007).

¶ 43 Defendant's next contention is largely derived from his last; he contends that trial counsel was ineffective for failing to properly object to, or preserve in a posttrial motion his objections to, the allegedly improper "course of the investigation" testimony. Claims of ineffective assistance of counsel are considered under the familiar standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See *People v. Petrenko*¸ 237 Ill. 2d 490, 496 (2010). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that he was prejudiced by that deficient performance. *Id*. Generally, it is not ineffective assistance to fail to undertake a futile act. See *People v. Wilson*, 164 Ill. 2d 436, 454, (1994) ("trial counsel's failure to file a motion does not establish incompetent representation, especially when that motion would be futile.")

¶ 44 Here, we have already determined that the allegedly improper statements were admissible nonhearsay. Accordingly, trial counsel could not have been ineffective for failing to object or properly preserve the issue for review. See *Id.*

¶ 45 Finally, defendant contends, and the State concedes, that the mittimus incorrectly reflects two counts of child abduction where the trial court merged the counts in its oral pronouncement. Where the mittimus fails to accurately reflect the trial court's oral pronouncement, it is within our power pursuant to Illinois Supreme Court Rule 615(b) (eff. Aug, 27. 1999) to order the clerk of the circuit court to correct the mittimus. See *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). Accordingly, we order the clerk of the circuit court to correct the mittimus.

¶ 46 Therefore, for the foregoing reasons, we affirm the judgment of the circuit court of Cook County and order the clerk or the circuit court to correct the mittimus to reflect a single conviction on Count 1 of the indictment.

¶ 47 Affirmed; mittimus corrected.